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No. 95
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RUDDIE D. TRIM,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

**On Petition for Writ of Certiorari to the
Court of Criminal Appeals of the State of Oklahoma**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In criminal cases involving charges for the dissemination of obscene materials, can a State exempt from prosecution one group of employees (projectionists employed at movie theaters) and not exempt a similarly situation group of employees (bookstore cashiers) without violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES TO PROCEEDING

All parties to this action are named in the caption.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RUDDIE D. TRIM, *Petitioner*,
v.
THE STATE OF OKLAHOMA, *Respondent*.

**On a Petition for Writ of Certiorari to the
Court of Criminal Appeals of the State of Oklahoma**

Ruddie D. Trim respectfully petitions for a Writ of Certiorari to review the Judgment and Sentence of the Court of Criminal Appeals of the State of Oklahoma.

I. OPINIONS BELOW

The Opinion of the Court of Criminal Appeals for the State of Oklahoma is reported at *Trim v. State*, 909 P.2d 841 (Okla.Crim.App. 1996). That decision was issued on January 5, 1996. That opinion is attached as Appendix "A." On February 6, 1996, the Oklahoma Court of Criminal Appeals issued an order denying the Petition for Rehearing. That opinion is attached as Appendix "B."

II. JURISDICTIONAL STATEMENT

The Oklahoma Court of Criminal Appeals, the highest Oklahoma court in which Petitioner could obtain relief, issued its decision affirming Mr. Trim's conviction and sentences imposed on January 5, 1996.

The Oklahoma Court of Criminal Appeals denied Mr. Trim's application for rehearing and directed issuance of the mandate on February 6, 1996.

This Court' jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. XIV provides, in pertinent part:

Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 21 O.S. 1991, § 1040.53:

The provisions of the statutes of this State and the provisions of ordinances of any City prescribing a criminal penalty for the exhibition of any obscene motion picture shown in a commercial theater open to the general public shall not apply to a projectionist or assistant projectionist, usher or cashier, provided he has no financial interest in the show or in its place of its presentation other than regular employment as a projectionist or assistant projectionist, usher, or cashier. Provided further, that such person is not acting as manager or director of such theater. The provision of this act shall not exempt any projectionist or assistant projectionist, usher or

cashier from criminal liability for any act unrelated to projection of motion pictures in a commercial theater open to the general public.

Title 21 O.S. 1991, § 1021(A)(3) states:

A. Every person who willfully either:

* * *

3. writes, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, book, picture, photograph, motion picture, figure, or form of any description

...

* * *

shall be guilty, upon conviction of a felony and shall be punished by the imposition of a fine of not more less than One Hundred Dollars (\$100.00) nor more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not less than thirty (3) days nor more than ten (10) years, or by both such fine and imprisonment.

IV. STATEMENT OF THE CASE

In 1989, Mr. Trim was convicted in the District Court of Oklahoma County, State of Oklahoma, with three counts of Selling Obscene Magazines in violation of Title 21 O.S. 1991,

§ 1021(a)(3). He was convicted of all three charges. Pursuant to the jury's verdict, Mr. Trim was directed to pay a \$4000 fine on one count. The \$4000 fines on the other counts were suspended. The jury did not assess any prison time.

Mr. Trim appealed his convictions to the Oklahoma Court of Criminal Appeals. On January 5, 1996, the court issued its opinion. *See Trim v. State*, 909 P.2d 841 (Okla.Crim.App. 1996). On double jeopardy grounds, the court dismissed two counts.

The Oklahoma Court of Criminal Appeals rejected Mr. Trim's argument regarding the violation of equal protection of the law. However, one member of the court issued a dissenting opinion wherein he concluded that the failure to exempt bookstore cashiers from prosecution for dissemination of obscene materials while movie projectionists were exempted from prosecution violated the equal protection doctrine.

The case involves the arrest and prosecution of Mr. Trim for selling supposedly obscene literature at the Adult World Bookstore in Oklahoma City, Oklahoma. Two undercover vice squad officers came into the store and purchased magazines. The magazines were wrapped in cellophane so they could not be opened in the store. The officers took the magazines out of the store, reviewed them, and subsequently returned and arrested Mr. Trim.

The majority opinion of the Court of Criminal Appeals stressed that a bookstore clerk, unlike a movie projectionist, has a "decision-making" role in the dissemination of obscene material. However, the court disregarded evidence that Mr. Trim took no active role in the sale of the magazines to the undercover officers except for taking their money.

V. REASONS FOR GRANTING THE WRIT

BOOKSTORE CASHIERS ARE SIMILARLY SITUATED TO PROJECTIONISTS IN MOVIE THEATERS AND SHOULD NOT BE LIABLE FOR DISSEMINATION OF OBSCENE MATERIALS IF PROJECTIONISTS ARE EXEMPTED FROM CRIMINAL LIABILITY

In our system of justice, similarly situated individuals should not be treated differently. U.S. Const. amend. XIV. In Oklahoma, in criminal cases involving the distribution of obscene materials, similarly situated individuals are treated different. In Oklahoma, a person who works in a bookstore and sells an obscene magazine, even if he had nothing to do with the business operation other than taking the customer's money, can be charged. However, a person who works as a projectionist in a movie theater cannot be charged with dissemination of an obscene movie. Ruddie D. Trim was caught in this predicament. He was denied the equal protection of the law. The Court should grant certiorari to review this important aspect of the doctrine of equal protection of the law.

The decision of the Oklahoma Court of Criminal Appeals conflicts with a decision of the Maryland Supreme Court. In *Wheeler v. State*, 380 A.2d 1052 (Md. 1977), the court held that to the extent an obscenity statute exempted from prosecution motion picture employees while not providing the same exemption for other employees, such as bookstore clerks, it violated equal protection.

The Maryland appellate court set forth analysis rebuking any attempt to find a "rational basis" for such an exemption. The court said:

We do not see the relevance in the degree to which the obscene matter is handled. In any event, it seems a film projectionist, attaching the reels, threading the film in the projector, activating the projector, splicing the broken film, and rewinding the film, comes into contact with the obscene matter no less than a salesclerk in a bookstore who accepts the article the purchaser has selected, puts it in a bag and hands it back upon payment of the purchase price.

380 A.2d at 1059.

The court further rebuked the "rational basis" distinction by saying:

We do not think the mere possibility of further distribution after a sale in a bookstore, in itself, warrants the classification. The basic fallacy, however, in the reasoning of the Court of Special Appeals is that the statute cannot be read so that the exemption pertains only to the showing of motion pictures as such. Thus, a user in the exempted class who distributes to the theater patrons a program concerning the film being shown, which program itself constituted obscene matter, would not be subject to the prohibitions of § 418. The bookstore employee, however, or any other person not within the exempted class, who distributed that same program, would be subject to punishment for violation of the statute.

Thus, the law operates on some persons and not upon other liked situated or circumscribed.

380 A.2d at 1059.

The Maryland court concluded by saying, "[A] classification based upon control of obscene films and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the government objective. 380 A.2d at 1060. The *Wheeler* case was cited by the Colorado Supreme Court in *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 357 n. 12 (Colo. 1985).

The opinion of the dissenting judge here and the Maryland Supreme Court is the most logical application of the equal protection doctrine. Book store cashiers, such as Mr. Trim, have no more control over what books are sold than theater workers have over what films are shown.

The record in the present case shows that Mr. Trim did not exercise any decision making role in the dissemination of the magazines. In fact, the magazines were all wrapped in cellophane. (Tr. 54, 71). Mr. Trim could only see the cover. The Oklahoma Court of Criminal Appeals' analysis regarding the bookseller's input into the sale of the book is certainly misplaced in this case.

The Oklahoma Court of Criminal Appeals overlooked the evidence that shows convincingly that Mr. Trim did not fit into the category of having an active role in the dissemination of the magazines. He did not direct the undercover police officers to certain magazines. He did not recommend certain materials over others. His "decision-making" role was not any greater than that of the movie theater usher or projectionist. In fact, his

lawyer said that all Mr. Trim did was "stand right there like a zombie at the cashier's area." (Tr. 31)

The Oklahoma Court of Criminal Appeals' decision is also in conflict with decisions from other state courts. For example, in *Pack v. City of Cleveland*, 438 N.E.2d 434 (Ohio 1982), the Supreme Court of Ohio held that exemptions of parties from the state motion picture and projectionist statute creates a classification that serves no legitimate state purpose and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

Similarly, the Louisiana Supreme Court in *State v. Johnson*, 343 So.2d 705 (La. 1977), held that it was unconstitutional, on equal protection grounds, to exempt parties from the "projectionist statute" on the grounds that they were not projectionists because that creates an impermissible classification among the same types of employees. *See also State v. Burgun*, 49 Ohio App. 2d 112, 359 N.E.2d 1018 (1976).

Whatever rational basis might be proposed or imagined for distinguishing bookstore cashiers from movie theater employees, such distinctions do not fit the realities of this case. Title 21 O.S. 1991, § 1021(A)(3) is unconstitutional as applied to people like Mr. Trim who do no more than ring up prices at a cash register.

CONCLUSION

For the reasons stated above, Mr. Trim respectfully prays that Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma.

Respectfully Submitted,

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APPENDIX

APPENDIX "A"
IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

RUDDIE D. TRIM,) Filed
Appellant,) January 5, 1996
vs.)
STATE OF OKLAHOMA,)
Case No. F-89-1207)
Appellee.)

OPINION

LANE, JUDGE:

Ruddie D. Trim was convicted by jury of three counts of Selling Obscene Magazines in violation of 21 O.S. Supp. 1984, § 1021(A)(3) in Oklahoma County District Court Case No. CRF-88-2837, Honorable James L. Gullet presiding. He was sentenced to pay a \$4000 fine per count and sentence was suspended on two counts. We affirm Count I and reverse Counts II and III with instructions to dismiss.

Trim, a clerk at the Adult World Bookstore, sold three obscene magazines to undercover police. The undercover police selected the magazines and bought all three at once. Trim was arrested shortly thereafter and charged with three counts of Selling Obscene Magazines, one per magazine. He argues in his first proposition the filing of multiple counts

II

based on the single transaction violates his Fifth Amendment right to be free from double jeopardy. Relying on cases from other jurisdictions,¹ the State presents a well reasoned argument to affirm all three counts. We are not persuaded to look to other jurisdictions, however, for the issue is well settled in Oklahoma.

In *Hunnicutt v. State*, 755 P.2d 105 (Okl.Cr. 1988) this Court held the federal constitutional right to be free from double jeopardy bars conviction for multiple counts of one offense arising out of one transaction. *Hunnicutt* paid an undercover police officer and was given a sack containing two stolen pistols. This transaction supported only one count of attempting to receive stolen property. *Id.* at 110-111. A similar result was reached in *Watkins v. State*, 829 P.2d 42 (Okl.Cr. 1991) *modified*, 855 P.2d 141 (Okl.Cr. 1992). In *Watkins* the defendant was convicted of two counts of conspiracy and possession with intent to distribute controlled dangerous substances after shipping a single package which contained both cocaine and phencyclidine. This Court followed *Hunnicutt* and reversed on double jeopardy grounds upon finding the convictions arose out of a single transaction. *Id.* at 43.

Nothing in the defining language of 21 O.S. Supp. 1984, § 1021(A)(3) suggests a different result. Accordingly, judgment and sentence for two of the three Counts must be reversed and remanded with instructions to dismiss.

Citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), Appellant next argues

III

21 O.S. Supp. 1984, § 1021(A)(3) is unconstitutionally overbroad for it criminalizes behavior protected by the First Amendment. This argument balances precariously on the definition of "sexual conduct" found in 21 O.S. Supp. 1984, § 1024.1 (3)(a):

Acts of sexual intercourse including any intercourse which is normal or perverted actual or simulated.

Appellant does not say what relevance this definition has to § 1021(A)(3) under which he was prosecuted, and we find none. Section 1021(A)(3) does not address acts of sexual intercourse, it addresses only the obscene or indecent – material beyond the reach of the First Amendment. *See Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1972).

Appellant continues his constitutional challenge of § 1021 by claiming his right to equal protection² was violated when the trial court refused to instruct the jury that he was exempt from prosecution based on the provisions of 21 O.S. 1981, § 1040.53 which protects movie theater employees. This statute provides in part:

The provisions of statutes of this state and the provisions of ordinances of any city prescribing a criminal penalty for exhibit of any obscene motion picture shown in a commercial theater open to the general public shall not apply to a projectionist or assistant projectionist, usher or

¹ *Educational Books, Inc. v. Commonwealth*, 323 S.E.2d 84 (Va. 1984); *City of Madison v. Nickel*, 223 N.W.2d 865 (Wis. 1974).

² U.S. Const. amend. XIV, § 1.

cashier, provided he has no financial interest in the show or in its place of presentation other than regular employment as a projectionist or assistant projectionist, usher or cashier. Provided further, that such person is not acting as manager or director of such theater.

Appellant asserts he is similarly situated with the employees of theaters which show obscene films, yet he is not similarly exempt from prosecution. Appellant correctly notes this Court has held § 1040.53 does not extend to clerks who sell obscene materials in bookstores. *See Glenn v. State*, 749 P.2d 121, 124 (Okl.Cr. 1988).

To determine whether this statutory distinction offends the Equal Protection Clause, we first determine the level of scrutiny to apply to the legislative classification of bookstore clerks on the one hand, and movie theater employees on the other. If the classification interferes with the exercise of a fundamental right, or if it disadvantages a suspect class, the Court must apply strict scrutiny, and the classification is constitutional only if it satisfies a compelling state interest. *See Plyler v. Doe*, 457 U.S. 202, 217, n. 15, 102 S.Ct. 2382, 2395 n. 15, 72 L.Ed.2d 786 (1982) (fundamental right); *Id.* at 216 n. 14, 102 S.Ct. at 2394 n. 14 (suspect class).

As obscene material is outside the protection of the First Amendment, no fundamental right is involved here. Bookstore clerks are not a suspect class for the group is not defined by "circumstances beyond their control [which] suggest the kind of 'class or caste' treatment the Fourteenth Amendment was designed to abolish." *Id.* Thus § 1040.53 need not be subjected to strict scrutiny.

We need only determine whether there is a rational basis for the legislative distinction which protects movie theater employees but not bookstore clerks. A rational basis exists if the legislative classification is reasonably related to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 763, 15 L.Ed.2d 620 (1966).

When we compare the employment responsibilities of bookstore and movie theater employees, we find significant differences. Movie theater employees have no control or influence over what film is seen. They simply sell tickets, and show the film provided by the manager. Significantly, the manager is not exempt. 21 O.S. 1981, § 1040.53.

The bookstore clerk has a more active role in sales than the exempt movie theater employee. The clerk may direct customers to certain materials, or recommend certain materials over others. The clerk's decision-making role in the dissemination of obscene material is potentially much greater than that of the movie employee. On this basis the legislative distinction between the two groups sustains rational basis scrutiny. We find no equal protection violation here.

Appellant's final argument addresses instruction of the jury. He argues the scienter standard set forth in Instruction 5 is correct, but the standard imposed by Instruction 6 is not. Instruction 5 provided:

You are instructed that the words 'knowingly' and/or 'wilfully' as used in these instructions, require that you must find beyond a reasonable doubt from all the evidence in this case, (either direct or circumstantial, or both) that the defendant, Ruddie D. Trim, knew the contents of the material introduced into evidence as

State's exhibits No. one (1) and two (2) and three (3).

You are instructed that acts of the defendant must be wilful under the statute.

In this connection you are instructed that for the defendant to have wilfully sold an obscene magazine(s) he must have knowledge of the character of the contents of the magazine alleged to be obscene.

We agree this instruction is proper. *See Hanf v. State*, 560 P.2d 207, 211 (Okl.Cr. 1977).

Instruction 6 provided:

It is not necessary that the Defendant be shown to have known the exact content or to have actually seen or read the particular materials at issue, but only that he knew the nature and character of the materials distributed. It does not matter that the Defendant did not know or believe the materials were obscene.

This instruction is in harmony with *Hanf*. In *Hanf* we held that proof of an awareness, rather than absolute knowledge, of the nature of the material sold is sufficient to meet the constitutional guidelines established in *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) *reh'g denied*, 361 U.S. 950, 80 S.Ct. 215, 4 L.Ed.2d 383 (1960). *Hanf*, 560 P.2d at 210-11. This standard of proof was further clarified in *Morrison v. State*, 619 P.2d 203 (Okl.Cr. 1980) in which we held that in order to prove scienter, "the

prosecution need only show that [the] accused knew the nature and character of what he is selling." *Id.* at 208. Thus, Instruction 6 explains rather than contradicts Instruction 5. There is no error identified by this argument.

Having found two of the three convictions in this case violate the appellant's constitutional right to be free from double jeopardy, we **AFFIRM** Count I, and **REVERSE** Counts II and III **WITH INSTRUCTIONS TO DISMISS**.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

BEFORE THE HONORABLE JAMES L. GULLETT DISTRICT JUDGE

RUDDIE D. TRIM, Appellant, was tried by jury for three counts of Selling Obscene Magazines in Case No. CRF-88-2837 in the District Court of Oklahoma County before the Honorable James L. Gullett, District Judge. Appellant was sentenced to pay a fine of four thousand dollars (\$4000) per count, with sentence suspended on two counts. Count I is **AFFIRMED**, Count II and Count III are **REVERSED** with instructions to **DISMISS**.

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OPINION BY: LANE, J.

JOHNSON, P.J.: concur in part/dissent in part
 CHAPEL, V.P.J.: concur
 LUMPKIN, J.: concur
 STRUBAR, J.: concur

JOHNSON, P.J.: CONCURS IN PART/DISSENTS IN PART

While I agree with the opinion concerning the principles of Double Jeopardy, I must dissent to the majority's application of equal protection analysis.

A classification against a class member must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. All persons similarly circumscribed shall be treated alike. *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688, 694 (1975). Equal protection emphasizes a difference in treatment between classes of individuals whose situations are the same. *Evitt v. Lucey*, 469 U.S. 387, 406, 105 S.Ct. 830, 83 L.Ed.2d 821, 836 (1985).

It is obvious to me that the members of the class within 21 O.S. 1981, § 1040.53, will never be heard to complain because they are criminally exempt under the statute. Thus, only one outside the class, but similarly circumscribed, will ever be heard to cry "foul" at the different treatment. We have that very scenario before us at this time.

Title 21 O.S. 1981, § 1040.53 criminally exempts a projectionist, assistant projectionist, usher or cashier in a commercial theater open to the general public which exhibits obscene motion pictures, provided that the party is not acting as manager and has no financial interest in the theater. However, 21 O.S. 1986, § 1021(A) provides criminal penalty for every person who willfully "sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, book, picture, photograph, motion picture, figure, or form of any description"

I am of the opinion that an employee of a commercial theater exhibiting obscene motion pictures, who has no financial interest and is not acting as manager, and an employee of a commercial adult bookstore displaying obscene magazines, again having no financial interest in the store and not acting as manager, are similarly circumscribed. I find no substantive

distinction between a cashier of a commercial adult theater and a cashier of a commercial adult bookstore. Yet, one can be criminally prosecuted, while the other is criminally exempt.

Thus, I would hold 21 O.S. Supp. 1984, § 1021(A)(3) unconstitutional as it denies equal protection to individuals whose situations are arguably indistinguishable. I would further *REVERSE* this case with instructions to *DISMISS*.

APPENDIX "B"
IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

RUDDIE D. TRIM,)
)
Appellant,)
)
vs.) No. F-89-1207
)
STATE OF OKLAHOMA,)
)
Appellee.)

ORDER DENYING REHEARING

Ruddie D. Trim was convicted by jury of three counts of Selling Obscene Magazines in Oklahoma District Court Case No. CRF-88-2837. He was sentenced to pay a fine of \$4000 per count, with sentence suspended on two of the three counts. This Court affirmed judgment and sentence for Count I, and reversed Counts II and III with instructions to dismiss. *Trim v. State*, ___ P.2d ___, 67 OBJ 142 (Okl.Cr. 1996). Appellant has filed for rehearing arguing (1) *Wheeler v. State*, 380 A.2d 1052 (Md. 1977), which he did not cite on appeal, warrants reversal, and (2) delay in deciding the appeal warrants modification of sentence.

The Maryland Court of Appeals in *Wheeler* found no rational basis for the distinction between employees of bookstores and employees of motion picture theaters in its statute regulating the publication, printing, sale and distribution of obscene material. The *Wheeler* dissent finds the majority

opinion is not required by either the state or federal constitution. 380 P.2d at 1052. We agree, and do not find *Wheeler* controlling.

The issue of appellate delay is not a proper grounds for rehearing, and we decline to reach it on the merits. See Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S. Supp. 1995, Ch. 18, App.

IT IS THEREFORE THE ORDER OF THE COURT
REHEARING IS DENIED.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT
this 6th day of February, 1996.

CHARLES A. JOHNSON, PRESIDING JUDGE

CHARLES S. CHAPEL, VICE PRESIDING JUDGE

GARY L. LUMPKIN, JUDGE

JAMES F. LANE, JUDGE

RETA M. STRUBAR, JUDGE